

The Notice of Proposed Rulemaking
Issued by
The Department of Transportation
Regarding
Actual Control of U.S. Air Carriers

Written Testimony Of

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Good morning, Mr. Chairman and Members of the Committee. I am Jeffery Smisek, President of Continental Airlines. It is a pleasure to be here representing my 42,000 co-workers at Continental.

Thank you for your invitation to testify at today's hearing. Continental opposes the Department of Transportation's (the Department or DOT) Notice of Proposed Rulemaking on Foreign Ownership and Control (NPRM) for a number of reasons.

Continental believes that the proposal released by the Department is unlawful. Continental also believes that it is poorly conceived, unworkable, and therefore, unlikely to result in additional foreign equity capital for U.S. carriers. I have attached Continental's formal filing in the Department's docket regarding the NPRM and refer to that filing to provide the legal basis for my arguments and for further explanation of Continental's opposition.

Let me summarize the Continental filing. Continental opposes the Department of Transportation's proposal because it unlawfully places actual control of U.S. airlines in foreign hands, in complete violation of aviation statutes passed by Congress and in opposition to well settled precedent requiring genuine U.S. control of U.S. airlines. Additionally, many other Agencies have recognized that "control" means what the Department has historically recognized, not what the foreign control NPRM proposes. Simply put, DOT has no authority or discretion to interpret this law differently when Congress has already made clear that actual control of a U.S. airline, and that means every part of the airline, must be in the hands of U.S. citizens. This is not a case of Congress leaving the statute unclear and DOT filling the gaps with interpretation. This is a case of the Department attempting to turn actual control by a U.S. citizen into actual control by a foreign citizen. When Congress has spoken clearly, as it has in this case, that is the end of the matter.

Continental supports a thorough analysis and discussion on the topic of actual control and foreign ownership of U.S. airlines, but that discussion should take place in the Halls of Congress, not in the fine print of the Department's docket. The Department simply cannot, under the guise of "interpretation," turn the statute on its head and decide that the words "actual control" by U.S. citizens in the aviation statute mean precisely the opposite of their longstanding clear and unambiguous meaning. The deliberate lack of clarity about what is allowed and what is not allowed in the NPRM creates such uncertainty that, rather than foreign investment becoming more likely, it will almost certainly become less likely should the Department's proposal be adopted. Adding to the uncertainty will be the certainty of litigation over the final rule. Although the Department's proposal is based on the claim that foreign control of U.S. airlines would enhance access to worldwide capital markets, the uncertainty caused by adopting an NPRM that is completely at odds with the statute will discourage, rather than encourage, foreign investors from making the very investments in U.S. airlines that the Department says it intends to encourage.

Continental believes that the foreign control proposal will actually discourage investment in U.S. airlines, by both foreigners and U.S. citizens. The NPRM, in truth, is nothing more than a hoax intended to seduce European countries into signing a multilateral air transport agreement based on the false premise that European airlines will be able to gain effective control of U.S. airlines.

According to various credible written and oral reports, the Department's proposal would permit long-prohibited control via supermajority or disproportionate voting rights, negative control/power to veto, buy out clauses, significant contracts providing explicitly or implicitly for foreign control, credit agreements and debt containing control provisions, and control through webs of business relationships among U.S. airlines and foreign airlines, foreign manufacturers of aircraft, foreign labor, or even foreign religious or governmental agencies. Further, although the Department has indicated that this is simply an interpretation of the statute, it has nonetheless determined that "actual control" means something different depending on the nationality of the foreign investor – something clearly not contemplated by the statute.

The DOT's attempt to interpret the statute to mean that foreign interests can actually control U.S. airlines **except** in the areas of security, safety, CRAF and the control of organizational documents is simply unworkable. If the DOT truly believes that you can separate out the areas of safety, security and CRAF and isolate them from other areas of the company, I can only say there must be no one at the DOT who has ever actually worked at an airline. Continental has an officer who is in charge of Corporate Security and he has people who work directly for him. But the people who work at the airports, load cargo, fly the planes, schedule the planes, hire our employees, and contract with vendors, are all on the front lines of our security efforts, and they work for the Vice Presidents of Airport Services, Flight Operations, Cargo, Human Resources, Technical Services, System Operations and so on. And, of course, the CEO and other senior officers, who apparently could serve foreign interests and be controlled by foreigners, have the authority to hire, promote, fire and set the salaries and incentive compensation of all of those people. The same is true for Safety – everyone in the company has a safety role – there isn't "one" person in charge of safety. And, let's talk about CRAF. The CRAF program depends on wide body aircraft. If a foreign airline bought Continental and decided that the foreign airline would do all the international flying on their own wide bodies and Continental would simply be a feeder for their operations (which would be permitted by the NPRM), then Continental wouldn't have any wide body aircraft and wouldn't be participating in the CRAF program – for commercial reasons, of course. What if Lufthansa bought United and BA bought American and did the same thing? How would the U.S. protect the CRAF program from these "commercial" decisions? Is the U.S. Congress willing to commit the billions of dollars it would need to purchase and maintain a fleet of aircraft to move our troops when we need them moved quickly?

Just to give you a personal example of how airlines actually work and why you can't separate out certain functions, in March of 2001, a U.S. aircraft and crew were involved in a mid-air collision over the South China Sea while on a "surveillance" flight. The crew was detained by the Chinese. The U.S. worked hard to obtain their release but was concerned that the Chinese would not allow a military aircraft to land in Hainan in order to retrieve our soldiers. Continental has a large operation in Guam, and given our proximity to China, we were asked if we would be willing to take on that mission. Knowing that the trip could be dangerous for our crews, knowing that committing to be there for our country meant that we would have to have a plane fueled and crews available every minute of every day until the mission was executed (and that the time frame could go on for weeks), virtually all of the senior officers had to be involved in making the go/no go decision. Could we afford the cost of taking a plane out of service indefinitely? Of paying crews to stand by indefinitely? What about the inconvenience to the hundreds if not thousands of passengers whose flights would be cancelled? Were we willing to take on the commercial and security risks that the mission entailed? Were we willing to put our plane and our crews at risk of being seized? When all was said and done, our CEO (a former navy mechanic) thought the answer was easy – our country needed us. It was that simple. While we were not contractually bound to do so, we were uniquely situated to meet the mission and the commercial considerations were irrelevant. But, make no mistake – if it had been a "commercial" decision, the answer would have been different.

Finally, I would be remiss if I did not discuss the fact that the DOT is perverting a clear statutory standard and attempting to turn control of U.S. airlines over to foreigners by fiat in order to secure an aviation agreement with the European Union. While the Department has been careful to say that the two issues are unrelated, there is not a person involved in this process who does not agree that the NPRM and the European Union aviation agreement are linked. European Commission representatives have gone as far as to say "a change of the ownership and control system at (the) U.S. side" is "for us a very important contextual element, which at the end of the negotiations, we will take into account to assess if there is a balanced package on the table" (Reuters, November 3, 2005). Under the Department's proposal, the right to control U.S. airlines would be given away for rights of little to no value for U.S. combination airlines and the customers they serve. London Heathrow, Europe's largest and most significant airport for U.S.-Europe travel is closed to entry and would remain effectively closed to additional U.S. airlines, even if the multilateral open skies agreement were signed. This is because commercially competitive slots and facilities will not be available at London Heathrow to remedy the effects of years of discrimination against U.S. airlines denied entry at London Heathrow. Absent the provision of competitive, economically viable slots and facilities at London Heathrow, the greatest single impediment to free and fair U.S.-Europe competition will remain in place under the new open skies agreement. Usurping

Congress' role in determining the scope of foreign control over U.S. airlines for the purpose of securing this agreement with the European Union would be a poor trade at best. The right to fly is meaningless without the right to land.

Mr. Chairman and Members of the Committee, the Department should immediately withdraw its proposal and work with this Committee and the rest of Congress on a free and open discussion of the issues of foreign ownership and control in the proper forum, the Halls of Congress.

All of us at Continental appreciate this Committee's interest in this very critical issue. We support H.R. 4525, the proposed legislation that the Chairman and Ranking Member of this Committee, along with 110 other Members from both sides of the aisle, have sponsored. This legislation would remind the Department of its proper authority and prevent the ill-conceived proposal from being implemented. We urge you to pass this bill.

Mr. Chairman and Members of the Committee, again, thank you for the opportunity to address this critical issue which will dramatically impact U.S. carriers and potentially alter the landscape of our national air transportation system forever.